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In the Supreme Court of the United States

OCTOBER TERM, 1984

CARTER-GLOGAU LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in overruling petitioner's objections to an election because the Union's strike misconduct, which occurred before the election petition was filed, was too remote in time to have adversely affected the election.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Baker Machine & Gear, Inc., 220 N.L.R.B. 194 6

Blue Bird Body Co., 251 N.L.R.B. 1481 6

Catholic Medical Center v. *NLRB*, 589 F.2d 1166 6

Conair Corp., 261 N.L.R.B. 1189, enforcement denied, 721 F.2d 1355 6

Construction, Production and Maintenance Laborers' Local Union 383, 260 N.L.R.B. 1340 3

Gibson's Discount Center, 214 N.L.R.B. 221 6

Lyon's Restaurants, 234 N.L.R.B. 178 6

NLRB v. *Anchorage Times Publishing Co.*, 637 F.2d 1359, cert. denied, 454 U.S. 835 6

NLRB v. *R. Dakin & Co.*, 477 F.2d 492, on remand, 207 N.L.R.B. 521 6

NLRB v. *Golden Age Beverage Co.*, 415 F.2d 26 ..... 4, 5

Page

Cases—Continued:

NLRB v. *L & J Equipment Co.*, No. 83-3275 (3d Cir. Sept. 28, 1984) 6

NLRB v. *Lawrence Typographical Union*, 376 F.2d 643 6

NLRB v. *L.B. Foster Co.*, 418 F.2d 1, cert. denied, 397 U.S. 990 6

NLRB v. *Pacific Southwest Airlines*, 550 F.2d 1148 6

NLRB v. *Savair Mfg. Co.*, 414 U.S. 270 6

Servomation of Columbus, Inc., 219 N.L.R.B. 504 6

United Dairy Farmers Cooperative Ass'n, 257 N.L.R.B. 772 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 5

Weather Seal, Inc., 161 N.L.R.B. 1226 6

Willis Shaw Frozen Express, Inc., 209 N.L.R.B. 267 6

YKK (U.S.A.), Inc., 269 N.L.R.B. No. 8 (Mar. 8, 1984) 6

Page

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

§ 8(a)(1), 29 U.S.C. 158(a)(1) 4

§ 8(a)(5), 29 U.S.C. 158(a)(5) 4

§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 3

§ 10(j), 29 U.S.C. 160(j) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 730 F.2d 767 (Table). The decision and order of the National Labor Relations Board (Pet. App. 6a-26a) are reported at 265 N.L.R.B. 116. The decision of the Board's Regional Director (Pet. App. 27a-47a) and the hearing officer's report (Pet. App. 48a-102a) in the underlying representation proceeding are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1984, and a petition for rehearing was denied on June 25, 1984 (Pet. App. 113a-114a). The petition for a writ of certiorari was filed on September 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Union[1] represents production and maintenance employees at petitioner's plant in Glendale, Arizona. Upon expiration of the parties' collective bargaining agreement in November 1980, the Union began an economic strike that continued throughout the time period relevant to this case. On March 27, 1981, a member of the bargaining unit filed a petition to decertify the Union as the bargaining representative of the employees, and the Board conducted an election among the employees on July 1, 1981. Pet. App. 57a, 63a. The initial tally of ballots showed 65 votes against and 55 in favor of the Union, with 28 challenged ballots (*id.* at 49a).

Following a hearing, the Board's hearing officer recommended that all 28 challenged ballots be counted (Pet. App. 73a-98a). In addition, the hearing officer recommended that objections to the election filed by both the Union and petitioner be overruled (*id.* at 57a-73a). Specifically, the hearing officer recommended overruling petitioner's objection that the Union made certain misrepresentations of fact concerning the company during the election campaign (*id.* at 62a-73a).[2]

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[1]Construction, Production, and Maintenance Laborers' Local No. 383, Laborers' International Union of North America, AFL-CIO.

[2]Petitioner contended that a letter from the Union to employees falsely stated that the decertification petition had been filed by the company and made certain other misrepresentations concerning terms of employment, petitioner's position in contract negotiations, and petitioner's attitude toward and treatment of employees. Petitioner also claimed that union representatives falsely stated to certain employees that the purpose of the decertification election was to determine whether employees would collect backpay and that a "yes" vote meant that they would. Pet. App. 51a-54a. The hearing officer found that the letter did not contain material misrepresentations and constituted permissible campaign propaganda, that petitioner had failed to establish that the alleged statements concerning the purpose of the election had been made and that, even if the statements had been made, they were made to only one of 148 voters and therefore did not affect the outcome of the election (*id.* at 62a-73a).

The Regional Director adopted the hearing officer's recommendation as to 23 of the 28 challenged ballots and also adopted his recommendation that the election objections be overruled (Pet. App. 27a-47a). Specifically, the Regional Director rejected petitioner's newly-raised claim that alleged incidents of union picket line misconduct during the winter before the election,[3] coupled with the alleged campaign misrepresentations that formed the basis of petitioner's election objections, had a cumulative impact on the election such that its objections should be sustained. The Regional Director agreed with the hearing officer that the campaign statements constituted "permissible election campaign rhetoric" (*id.* at 37a). In addition, the Regional Director noted that the alleged incidents of strike misconduct had occurred a number of months before the election and before the filing of the election petition, and he concluded that "such alleged conduct could not and did not interfere with the conduct of the election" (*id.* at 37a n.5).

On the basis of the Regional Director's decision,[4] the ballots the challenges to which had been overruled or withdrawn were counted, and the revised tally showed 77 votes

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[3]The Board's General Counsel had issued an unfair labor practice complaint against the Union alleging picket line misconduct — including mass picketing, threats, and property damage — on various dates from November 1980 to March 1981. On March 2, 1981, the Board obtained an injunction pendente lite against the misconduct pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j) (Pet. App. 103a-108a). On March 30, 1982, after the Board's decision in the instant representation proceeding, the Board found that the Union's conduct violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A). *Construction, Production and Maintenance Laborers' Local Union 383*, 260 N.L.R.B. 1340 (1982).

[4]On March 4, 1982, the Board denied requests by petitioner and the Union to review the Regional Director's decision (see Pet. App. 11a-12a).

for the Union and 67 against (*id.* at 12a). The Union was certified as the bargaining representative of the employees on April 9, 1982 (*ibid.*).

2. Petitioner thereafter refused to recognize and bargain with the Union. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charges against petitioner were or could have been litigated in the prior representation proceeding. The Board granted the motion, found that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union, and entered a bargaining order. Pet. App. 6a-26a.

3. The court of appeals enforced the Board's order in full (Pet. App. 1a-5a). Rejecting petitioner's contention that its election objections should have been upheld, the court concluded that the Union's conduct during the campaign was not objectionable under the Board's standard for judging campaign propaganda (*id.* at 2a-3a). In addition, the court upheld the Board's "finding that the alleged pre-petition misconduct of the Union provided an insufficient basis for overturning the election" (*id.* at 4a). The court concluded that "[t]he conduct was 'too remote (to the election) to have prevented the employees' exercise of free choice' " (Pet. App. 4a, quoting *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 31 (5th Cir. 1969)).

ARGUMENT

Petitioner no longer contends that the Union's campaign statements, which the Board and the court found to be permissible election propaganda, constituted objectionable conduct warranting a new election. Rather, although it never filed a separate election objection based on the Union's pre-petition strike misconduct, petitioner now contends (Pet. 15-34) that the Board and the court of appeals

erred by failing to set aside the election on the basis of the Union's pre-petition conduct. Specifically, petitioner contends that the Board erred by failing even to consider that pre-petition conduct.

That contention is not properly presented in the context of this case; the court of appeals, in enforcing the Board's order, did consider the evidence of strike misconduct at issue and concluded that the Board's decision was reasonable on the facts presented because the conduct was too remote in time to have adversely affected the outcome of the election (Pet. App. 4a). The court's conclusion is amply supported on this record. The strike misconduct occurred from four to eight months before the election. The Board obtained an injunction in March 1981 that prevented any further misconduct and allowed the effects of the strike activity to dissipate. See note 3, *supra*. After that time, no further conduct that could have adversely affected the election occurred.[5]

In any event, there is no merit to petitioner's contention (Pet. 15) that the law with respect to the relevancy of pre-petition conduct to election objections is in a state of disarray. The Board's general rule is that pre-petition conduct is generally considered "too remote to have prevented the employees' exercise of free choice" (*NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 31 (5th Cir. 1969)). The cases cited by petitioner (Pet. 15-18, 23-26) fall within certain limited exceptions to the Board's rule not applicable here. For example, the Board will consider pre-petition conduct

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[5]To the extent petitioner merely takes issue with the court's view of the evidence by contending that the strike misconduct "inevitably charg[ed] the electoral atmosphere with fear and coercion" (Pet. 29), that contention presents no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

when it accompanies objectionable post-petition conduct.[6] The Board also will consider pre-petition threats or inducements designed to encourage or discourage employees' initial union support, such as a union's offer to waive initiation fees for signing union authorization cards in violation of *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973).[7] And in the unusual case in which an election petition is withdrawn and subsequently replaced by a new petition, the Board will consider the effects of conduct occurring during the pendency of the first petition but before the final petition is filed.[8] But none of the cases cited by petitioner requires the Board to depart from its general

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[6]See, *e.g.*, *YKK (U.S.A.), Inc.* 269 N.L.R.B. No. 8 (Mar. 8, 1984), slip op. 2; *Blue Bird Body Co.*, 251 N.L.R.B. 1481, 1481 n.2 (1980); *Baker Machine & Gear, Inc.*, 220 N.L.R.B. 194, 207 (1975); *Servomation of Columbus, Inc.*, 219 N.L.R.B. 504, 505-506 (1975); *Willis Shaw Frozen Express, Inc.*, 209 N.L.R.B. 267, 268 (1974); *United Dairy Farmers Cooperative Ass'n*, 257 N.L.R.B. 772, 772-773 (1981); *Conair Corp.*, 261 N.L.R.B. 1189, 1189-1192 (1982), enforcement denied on other grounds, 721 F.2d 1355 (D.C. Cir. 1983); *NLRB* v. *L & J Equipment Co.*, No. 83-3275 (3d Cir. Sept. 28, 1984), slip op. 28; *NLRB* v. *Anchorage Times Publishing Co.*, 637 F.2d 1359, 1363-1365 (9th Cir.), cert. denied, 454 U.S. 835 (1981); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1150 (9th Cir. 1977); *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 2 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970).

[7]See *Lyon's Restaurants*, 234 N.L.R.B. 178, 179 (1978); *Gibson's Discount Center*, 214 N.L.R.B. 221, 222 & n.3 (1974); *NLRB* v. *Lawrence Typographical Union*, 376 F.2d 643, 652 (10th Cir. 1967).

[8]*Catholic Medical Center* v. *NLRB*, 589 F.2d 1166, 1170-1174 (2d Cir. 1978); *NLRB* v. *R. Dakin & Co.*, 477 F.2d 492, 493-494 (9th Cir.), on remand, 207 N.L.R.B. 521, 521-522 (1973).

In *Weather Seal, Inc.*, 161 N.L.R.B. 1226, 1228-1229 (1966), also cited by petitioner (Pet. 16), the Board, in the exercise of its authority to protect the integrity of its election processes, set aside an election based on its finding that a union appeared on the ballot due only to the unlawful pre-petition assistance and encouragement of the employer at a time when a rival union was organizing among the employer's workforce.

rule in a case such as this, which presents none of the exceptional circumstances that would justify such a departure.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]In accord with the Board's rule as it has been consistently applied, petitioner contended before the Board's Regional Director only that the pre-petition conduct was relevant insofar as it supplemented and cast light on the Union's allegedly objectionable post-petition conduct. It was only after the Regional Director found that the post-petition conduct was not objectionable that petitioner recharacterized its objection to focus solely on the pre-petition strike misconduct.

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